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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 173

MASON CITY AND FORT DODGE RAILROAD COMPANY

vs.

E. D. BOYNTON

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF AND ARGUMENT FOR MASON CITY AND FORT DODGE RAILROAD COMPANY

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BRIEF AND ARGUMENT FOR MASON CITY AND FORT DODGE RAILROAD COMPANY

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STATEMENT OF FACTS.

This case comes on a certificate from the Circuit Court of Appeals for the Eight Circuit. Upon a statement of the facts the following questions of law are presented to the Supreme Court.

1. Was the land owner a defendant, within the meaning of the Removal Statute, when the suit was removed into the Circuit Court?

2. If the land owner was not a defendant, within the meaning of the removal statute, could the Circuit Court take cognizance of the suit through a removal by him? Stated in other words, the question is this: Is the provision of the removal statute, to the effect that the removal, on the ground of diverse citizenship, may be "by the defendant or defendants therein, non-residents of that State," restrictive and jurisdictional in the sense that cognizance of the suit can be taken by the Circuit Court through a removal only when it is by the defendant, or is the provision only model and formal in the sense that non-compliance therewith, or non-conformity thereto, may be waived?

3. Is the judicial proceeding which the land owner is authorized by the statutes of Iowa to initiate in the District Court of the State, by way of a so-called appeal from the assessment of the commissioners by the sheriff, a suit which can be originally instituted in the Circuit Court of the United States, when the citizenship of the parties and the sum or value of the matter in dispute are such as to make the suit otherwise cognizable in that court?

4. If the Circuit Court could not have taken cognizance of the suit through the removal by the land owner, and if the Circuit Court could have taken cognizance of the suit through its original institution in that court after the assessment by the commissioners, did the parties by appearing in the Circuit Court and there litigating to a final conclusion the matter in dispute, without any objection to the jurisdiction of

the court or to the manner in which its jurisdiction was invoked, authorize the Circuit Court to exercise jurisdiction and to proceed to final judgment in like manner and with like effect as if the suit had been originally instituted in that court, the citizenship of the parties and the sum or value of the matter in dispute being such as to make the suit otherwise cognizable in that court?

POINTS.

I.

THE LAND OWNER WAS PLAINTIFF WITHIN THE MEANING OF THE REMOVAL STATUTE, WHEN THE SUIT WAS REMOVED INTO THE CIRCUIT COURT.

The corporation seeking to condemn real estate is in fact the defendant, and occupies a position analagous to that of a defendant in a case brought to recover the value of real estate which has been appropriated. This is the case where there is nothing left to contest but the value of the real estate taken.

Mississippi & Rum River Boom company vs. Patterson, 98, *U. S.*, 403.

This is a leading case on this question.

When a case is transferred to the District Court by appealing from the award of the commissioners, it took under the statutes of the state, the form of a suit at law, and was thenceforth subject to its ordinary rules and incidents. No other question was open to contest in the State District Court.

Turner vs. Holeran, 11 *Minnesota*, 253.

Mississippi & Rum River Boom Company vs. Patterson 98, *U. S.*, 403.

Meyers et al, vs. C. & N. W. et al, 118 *Iowa*, 312.

Sections 1999, 2009, 2010, 2011 of the Code of Iowa, (1897), set forth on pages 1 and 2 of the certificate.

This is the rule in condemnation proceedings under the Iowa statutes and the Supreme Court of Iowa holds that the condemning corporation on the trial in the State Court is in fact the defendant.

Myers et al, vs. C. & N. W. Ry. Co., 118 *Iowa*, 312.

See sections 1999, 2009, 2010, 2011 of the Code of Iowa (1897) set forth in the certificate, pages 1 and 2.

The Iowa Supreme Court cites in support of this conclusion the following cases:

Boom Company vs. Patterson, 98, *U. S.*, 403; 28 *L. Ed.* 207.
Railroad Co. vs. Myers, 115, *U. S.* 1; 29 *L. Ed.* 319.
Searle vs. School District, 124, *U. S.* 197.
Ragatz vs. City of Dubuque, 4 *Iowa*, 343.
Sigafoos vs. Tolbert, 25 *Iowa*, 214.

The case of Kirby vs. C. & N. W. Ry. Co., decided by District Judge McPherson, 106 Fed. Rep. 552, involved the same condemnation proceedings passed on by the Iowa Supreme Court in Myers vs. Railroad company, 118 Iowa, 315, and the decision in the case of Kirby vs. C. & N. W. Ry. Co. is in accord with the decision of the Iowa Supeme Court.

In support of the above point we also, cite
Chicago K & W. Ry. Co. vs. Butts, 55 *Kansas* 660.
Railroad Company vs. Owen, 8 *Kan.* 274.
Railway Company vs. Orr., 8 *Kan.* 289.
Risner vs. Strong, 24 *Kan.* 297.

The cases of Union Terminal Ry. Co., vs. C. B. & Q. Ry. Co., 119 Fed. Rep. 209; Madisonville Traction Co., vs. St. Bernard Mining Co. 130 Fed. Rep. 790; The Colorado Eastern R. R. Co. vs. C. B. & Q. Ry. 141 Fed. Rep. 898, and Madisonville Traction Co., vs. St. Bernard Mining Co., 196 U. S. 250, are not in conflict with our contention, or with the decisions above cited.

II.

THE FEDERAL COURT WILL RESPECT A CONSTRUCTION PLACED ON THE CONDEMNATION STATUTES BY THE STATE SUPREME COURT. IT BECOMES A RULE OF PROPERTY.

Madisonville Traction Co. vs. St. Bernard Mining Co. 196 *U. S.* 250.

Mississippi & Rum River Boom Co. vs. Patterson, 98 *U. S.* 403.
Leffingwell vs. Warren, 67 *U. S.* 599.
Bucher vs. Cheshire R. R. Co. 125 *U. S.* 555.
West River Bridge Co. vs. Dix. 6 *How.* 507.
Long Island Water Supply Co. vs. Brooklyn 166 *U. S.* 685.
Lowndes vs. Board, etc., 153 *U. S.* 1.
Bondurant vs. Watson, 103 *U. S.* 281.
Burgess vs. Seligman, 107 *U. S.* 20-33.
Gage vs. Pompelly, 115 *U. S.* 454.
Hardin vs. Jordan, 14 *U. S.* 371-382-402.
Union Bank vs. City of Memphis, 189, *U. S.* 71.
United States vs. Morrison, 4 *Pet.* 124.
Green vs. Neal's Lessee, 6 *Pet.* 291.
United States vs. Freeman, 113 *Fed. Rep.* 370-322.

III.

THE CIRCUIT COURT CANNOT TAKE COGNIZANCE OF A SUIT THROUGH A REMOVAL BY ANYONE SAVE "THE DEFENDANT OR DEFENDANTS THEREIN, BEING NON-RESIDENTS OF THE STATE." A FAILURE TO SO REMOVE IS A TRULY JURISDICTIONAL DEFECT

Martin et al vs. Snyder, et al, 148 *U. S.* 663.
Fife vs. Whitel, 102 *Fed. Rep.* 537.
Torrence vs. Shedd, 144 *U. S.* 527.
Ayres vs. Watson, 113 *U. S.* 594.
Martin vs. Baltimore & Ohio R. R. 151 *U. S.* 673.
Hanrick vs. Hanrick, 153 *U. S.* 192.
Fisk vs. Henarie, 142 *U. S.* 459.
In re Pa. 137 *U. S.* 451.
Blacks Dillion on Removal of Causes, Sec. 65.
Telegraph Co. vs. Brown, 32 *Fed Rep.* 337.
Anderson vs. Appleton, 32 *Fed. Rep*, 855.
Weller vs. Tobacco Co. 32 *Fed. Rep.* 860.

IV.

THERE CAN BE NO WAIVER OF A DEFECT IN THE JURISDICTION OF THE CIRCUIT COURT IF THE REMOVAL IS NOT MADE BY THE DEFENDANT AS REQUIRED BY SECTION 2 OF THE REMOVAL ACT.

Martin et al vs. Snyder et al 148 *U. S.* 663.
Graves vs. Corbin, 132 *U. S.* 571-592.
Stevens vs. Nichols, 130 *U. S.* 230.
Crehore vs. Ohio, etc., 131 *U. S.* 240.
Jackson vs. Allen, 132 *U. S.* 27.
Mansfield C. & L. M. R. Co. vs. Swan, 111 *U. S.* 379.
United States vs. Huckabee, 16 *Wall* 414.
Thompson vs. Railroad Co. 6 *Wall* 134.
Martin vs. Baltimore & Ohio R. R. Co. 151 *U. S.* 690.
Ayres vs. Watson, 113 *U. S.* 594.
Sec. 65 *Blacks Dillons Removal of Causes.*
Minnesota vs. Northern Securities Co. 194 *U. S.* 48.

The true question is not what either of the parties may be allowed to do, but whether the court will affirm or reverse a judgment of the Circuit Court when it appears that it is a case to which the judicial power of the United States does not exist.

Dissenting opinion of Justice Curtis, Dred Scott Case 19 How. 393.

Jurisdiction will not be required unless the removal is made by the party described; it is this which effectuates jurisdiction.

See Turner vs. Bank of North America, 4 *Dall.* 8.

V.

THE JUDICIAL PROCEEDING WHICH THE LAND OWNER IS AUTHORIZED BY THE STAT-

UTES OF IOWA TO INITIATE IN THE DISTRICT COURT OF THE STATE BY APPEALING FROM THE ASSESSMENT OF THE COMMISSIONERS SELECTED BY THE SHERIFF, IS A PROCEEDING WHICH COULD BE ORIGINALLY INSTITUTED IN THE CIRCUIT COURT OF THE UNITED STATES WITHIN THE MEANING OF THE REMOVAL ACT.

Madisonville Traction Co. vs. St. Bernard Mining Co., 196 *U. S.* 239.

Mississippi & Rum River Boom Co. vs. Patterson, 98 *U. S.* 403.

VI.

THE MASON CITY & FT. DODGE RAILROAD COMPANY BY APPEARING IN THE CIRCUIT COURT WITHOUT OBJECTING TO THE JURISDICTION OF THE CIRCUIT COURT DID NOT AND *COULD NOT GIVE THE CIRCUIT COURT JURIS-*DICTION TO RENDER JUDGMENT, IF THE CASE WAS REMOVED THERE UNDER THE PROVISIONS OF THE REMOVAL STATUTE.

If Boynton, the non-resident land owner, was the plaintiff, he could not transfer the cause from the State District Court to the Federal Circuit Court, and his case was one within the class that could not be transferred.

Martin vs. Snyder, 148 *U. S.* 662, *is necessarily decisive of this question.*

Parkinson vs. Barr, 105 *Fed. Rep.* 81-83. *Opinion by District Judge Hawley.*

Thurber vs. Miller 14 *C. C. A.* 432.

Federal Circuit Courts have no jurisdiction save that specifically conferred by statute.

U. S. vs. Hudson, 7 *Cranch*, 32.

Sheldon vs. Zill 8 *How.* 441.

It was for congress to say how much of the judicial

power of the United States shall be exercised by the subordinate courts it may establish from time to time.

Plaquemines Tropical Fruit Co. vs Henderson, 170 *U. S.* 511.

Turner vs. Bank of North America, 4 *Dall.* 8.

VII.

THERE IS NO ELEMENT OF ESTOPPEL AGAINST THE MASON CITY & FT. DODGE RAILROAD COMPANY WHICH PREVENTS IT FROM INSISTING THAT THE CIRCUIT COURT WAS WITHOUT JURISDICTION ON REMOVAL BY BOYNTON.

The acts of a party sought to be made the basis for an estoppel must be viewed in the light of the understanding he had of his rights, and not in the light of such rights as they may thereafter be determined.

City of Cleveland vs. Cleveland & R Co., 93 *Fed. Rep.* 113-125-131. Opinion by District Judge.

A party asserting estoppel must affirmatively show that he acted in reliance upon the act or declarations of the other party.

Malloney vs. Horen, 49 *N .Y.* 11.

Seekles vs. Norman, 71 *Iowa*, 265-267.

Blodgett vs. Penn., 97 *Mo.* 263.

Barney vs. Wheeler, 128 *Mo.* 84.

It is necessary that the party asserting estoppel should be without other knowledge of the facts, or means of acquiring such knowledge.

Smith vs. Trammel, 68 *Iowa*, 488-490.

Fischer vs. Johnson, 106 *Iowa*, 181-187.

Hel. vs. Epperly, 31 *Pa.* 334.

Phil. & W. B. R. R. Co. vs. Du Bois, 79 *U S.* 47.

There can be no estoppel where both parties have the same means of ascertaining the truth.

Branson vs. Wirth, 17 *Wall.* 33.

VIII.

THE ADJUDICATIONS IN WHICH ONE IS HELD ESTOPPED FROM DENYING THE JURISDICTION OF THE FEDERAL COURT, ARE THOSE IN WHICH THE PARTY WHO DENIES THE JURISDICTION INVOKED THE ACTION OF THE FEDERAL COURT, AND RELATE TO CASES IN WHICH THE DEFECTS ARE NOT TRULY JURISDICTIONAL AS DEFINED IN SECTION TWO OF THE REMOVAL ACT OF 1887-88.

Baggs vs. Martin, 179, *U. S.* 205.
Giles vs. Harris, 189 *U. S.* 475.
Ficher vs. Shropshire, 147 *U. S.*, 133.
Cowley vs. Northern Pacific, Ry. 159 *U. S.* 569.
Blythe vs. Huckabee, 173 *U. S.* 501-506.
Huntington vs. Laidley, 176 *U. S.* 666.

ARGUMENT

I

THE LAND OWNER WAS PLAINTIFF WITHIN THE MEANING OF THE REMOVAL STATUTE WHEN THE SUIT WAS REMOVED INTO THE CIRCUIT COURT.

FIRST QUESTION

The first question certified by the Circuit Court (Certificate page 3) is, "Was the land owner a defendant within the meaning of the removal statute when the suit was removed into the Circuit Court?"

The Mason City & Fort Dodge Railroad Company was a railroad corporation organized and existing under the laws of the state of Iowa.

C. D. Boynton, was the owner of certain lots in the town of Carroll, Carroll county, State of Iowa, and was at all times mentioned a citizen of the state of Missouri.

Prior to February 18, 1902, the railroad company requiring Boynton's lots as a right of way for the construction

of its railroad, filed an application in the office of the sheriff of Carroll county, Iowa, asking for the appointment of six free holders to inspect the lots and assess the damages which the owner would sustain by the appropriation of his lots for the use of the railroad company.

On February 18, 1902, the commissioners were duly appointed by the sheriff and made their report, assessing the owner's damages occasioned by the appropriation of his lots by the railroad company at $4,750.00.

On February 18, 1902, the same day that the assessment was made by the sheriff's commissioners, the railroad company paid the sheriff the amount of such assessment for the use of the owner, and went into actual possession and occupancey of the property condemned.

Afterwards, and within the time fixed by the state statute, the owner appealed from the commissioners' award to the District Court of Carroll county. Subsequently on his application the cause was removed to the Federal Circuit Court in which court a jury was waived by both parties and a judgment approximating $12,000, was rendered against the railroad company.

It is our claim that the land owner is in fact the plaintiff and that the railroad company is in fact the defendant.

We may well regard the case of

The Mississippi & Rum River Boom Company vs. Patterson, 98 *U. S.* 403.

a leading case on this question.

The plaintiff in error was a corporation created under the laws of Minnesota, and defendant was a citizen of the State of Illinois. Condemnation proceedings were instituted under the laws of the State of Minnesota to appropriate Patterson's land for boom purposes; the provisions of the Minnesota statute are referred to in the opinion of Mr. Justice Field, and are similar to the Iowa statute.

Both the Boom company and the land owner appealed

from the award made by the commissioners appointed to appraise the land, which commission was a non-judicial body.

This court held that the case was one removable under the Act of March 3, 1875, which provides "that any suit of a civil nature at law or in equity, pending or brought in a State court in which there is a controversy between citizens of different states, may be removed by *either party* into the Circuit Court of the United States for the proper district." We quote the following from the opinion of the Court:

"The proceedings in the present case before the commissioners appointed to appraise the land, was in the nature of an inquest to ascertain its value, and not a suit at law in the sense of those terms, but when it was transferred to the District Court by appeal from the award of the commissioners, it took under the statute of the state, the form of a suit at law and was forwith subject to its ordinary rules and incidents. *The point in issue was the compensation to be made to the owner of the land; in other words the value of the property taken; no nother question was open to contestation in the District Court.*

Turner vs. Holeran, 11 *Minn.*, 253."

And again,

"The case would have been in no essential particular different had the state authorized the company by statute to appropriate the particular property in question and the owners to bring suit against the company in the courts of law for its value.

That a suit of that kind could be transferred from the State to the Federal Court, if the controversy were between the company and citizen of another state, cannot be doubted, and we perceive no reason against the transfer of the pending case, that might not be offered against the transfer of the case supposed."

In this case the particular question as to whether the land owner was plaintiff or the condemning corporation was defendant was not directly discussed by the court, but we submit that the language of the court in determining the

character of the proceedings in the State Court leaves no question, but what the land owner was in truth the plaintiff. It could not be otherwise if the case "would have been in no essential particular different had the state authorized the company by statute to appropriate the particular property in question and the owners to bring suit against the company in the courts of law for its value."

The title to the property of Boynton in fact passed to the railroad company before the case was brought on appeal to the Iowa District Court, if the compensation fixed by the commissioners was paid before the case was brought into the District Court on appeal. The certificate shows the compensation was paid.

Section 1999 of the Iowa Code provides....."If the corporation shall at any time before it enters upon said real estate for the purpose of constructing said railway, pay to the sheriff for the use of the owner, the sum so assessed and returned to him as aforesaid, it may construct and maintain its railway over and across such premises."

Section 2010 provides, "An appeal shall not delay the prosecution of work upon said railway, if said corporation pays by deposit with the sheriff, the amount assessed."

This very question now presented to this court, came before the Supreme Court of Iowa in the case of Myers et al, vs. Chicago North-Western Ry. Co., 118 Iowa, 312.

In the cited case the Railroad Company, a citizen of the State of Illinois, sought to condemn land in Iowa belonging to Myers, a citizen of Pennsylvania. Myers, the non-resident land owner, appealed to the District Court of Iowa from the award of the commissioners, and the Railroad Company filed its application for removal to the Circuit Court of the United States.

The State District Court refused to order the removal of the case to the United States Circuit Court, which action was reversed by the Supreme Court of Iowa.

The opinion of the Supreme Court sets forth fully the provisions of the Iowa Statute now in force and construes

the same.

The Supreme Court of Iowa held that the Railroad Company was in fact *the defendant.*

Section 1999 of the Code, 1897, and the nine sections following, relate to proceedings and condemnation.

Section 2009 provides:

"That either party may appeal from such assessment to the District Court within thirty days after the assessment is made by giving the adverse party, or if such party is a corporation, its agent or attorney, notice in writing that such appeal has been taken. The sheriff shall thereupon file certified copy of so much of the appraisement as applies to the property appealed from and such court shall try the same as an action by ordinary proceedings. The land owner shall be plaintiff and the corporation the defendant."

We quote the following from the opinion of the Iowa Supreme Court in

Myers vs. Railroad Company, 118 *Iowa*, 315.

"An appeal, however, works no delay in the improvement if the corporation deposits with the sheriff the amount assessed, which he is to retain until the proceedings are terminated. (Section 2010 of the Code.)"

Section 2011 of the Code provides:

"On the trial of the appeal no judgment shall be rendered except for costs. The amount of damage shall be ascertained and entered of record, and if no money has been paid or deposited with the sheriff, the corporation shall pay the amount so ascertained or deposit the same with the sheriff before entering upon the premises. And the corporation declining to take the property and pay the damages awarded in the final determination of the appeal, then it shall pay in addition to the costs and damages actually suffered by the land owner, reasonable attorney fees to be taxed by the Court."

The Court again says:

"From these statutes it plainly appears that the proceedings before the commissioners appointed by the sheriff to appraise the land, is not a suit at law, but in the nature of an inquest to ascertain its value. No hearing is had, and no evidence introduced. The commissioners merely inspect the land and determine upon the amount of damage which will

be occasioned by the appropriation and make a written report to the sheriff; thus far then, the proceeding is in no respect a suit."

Again we quote from page 315:—

"That the proceeding to condemn land is not a suit within the meaning of the Removal Act of Congress, and is such after the appeal to the District Court, seems to be conclusively settled against the appellees in Boom Co. vs. Patterson, 98 United States, 403, 25 L. Ed. 207, and Railroad Company vs. Myers, 115 United States, 1; 29 L. Ed. 319; Searle vs. School District, 124 United States 197, 31 L. Ed. 415."

Again on page 317, the Iowa Supreme Court holds:—

"Appellees contend, however, that these decisions are not applicable because a change is made in the law by the Act of Congress of March 3, 1887, amended the following year. The object in this enactment was to restrict the jurisdiction of the Federal Court, both originally and by removal, and to obviate certain abuses in the matter of assignments of causes of action in order to confer jurisdiction, and the tendency has been toward a strict construction. Tennessee vs. United States, 454, 38 L. Ed. 511 and cases cited"

From page 324 we quote:—

"But it is urged that the Railroad Company is in reality the plaintiff, as it instituted the proceedings originally; the statute as seen authorizes the appointment of commissioners on the application of either the land owner or company. Either party has the right to appeal from the assessment to the District Court. The former could not be deprived of its property without the provision for a judicial proceeding, originally or by appeal." (Ragatz vs. City of Dubuque, 4 Iowa, 343). And trial by jury seems to be guaranteed by the constitution, Section 18, Article 1; Sigafoos vs Talbot, 25 Iowa, 214..... Indeed, the proceeding in so far as the District Court is concerned, was initiated by the notice of appeal. In such a case the Court in no sense reviews the previous finding, but investigates the value of the property *de novo*. If the assessment is paid, the Company may, as was done in this case, immediately enter into possession; it then appropriates the right of way; the only question remaining is the compensation; what the Company shall pay. It is in effect an action against the corporation for the value of the property taken. The case is not different than

it would have been had a statute authorized the initiative to be taken in the Districte Court, and damages for the taking assessed in the first instance in that tribunal.

This is the statutory reason for designating the land owner plaintiff, and the Company defendant."

The Court further holds, pages 324, 325—

"Here the action was carried to the District Court by the plaintiff. He was the party who invoked its jurisdiction, and as relief was then sought against the Company, we think both by statute and in the nature of the proceeding, it must be regarded the defendant."

In the case at bar Boynton had appealed to the District Court of Carroll county; it was Boynton who first invoked the jurisdiction of the State Court. The proceedings prior to the appeal were before a commission, a non-judicial body.

Boynton voluntarily sought a recovery in the State Court by invoking its jurisdiction under the provisions of the Iowa statute when he filed a notice of appeal. It was in this manner that a suit was initiated within the meaning of the Removal Statute.

In the language of the Iowa Supreme Court:

"Here the action was carried to the District by the plaintiff. He was the party who invoked its jurisdiction and as relief was then sought against the Company we think that both by statute and in the nature of the proceeding, it must be regarded the defendant."

The case of Kirby vs. Chicago Northwestern Ry. Co. 106 Fed Rep. 552, decided by Circuit Court, involved the same condemnation proceedings passed on by the Court in Myers vs. Railway Co. 118 Iowa 315.

The Circuit Court held that the Railroad company was in fact the actual defendant. We quote the following from the opinion of the Court on page 554.

"The plaintiffs were allowed $2,100.00; the plaintiffs could have taken the sum and the controversy would have been at an end. This must be so because the Company I presume, would have paid that, as it took no appeal. It from necessity, for plaintiff's use and benefit, deposited that sum with

the sheriff. It also was required to pay the costs. The Company took possession and appropriated the strip of land; we next have a controversy in the Marshall County District Court; the land owners placed the case there; for what purpose? Claiming damage for the appropriation by the Company of a strip of land, because the strip of land had been and could have been entered upon by the Company, provided they deposited twenty-one hundred dollars; the tribunal or whatever it was of the sheriff was statutory and not recognized by the constitution as one to which the parties could go. The State Court was the first tribunal in which effect could be given to the provisions that the rights of trial by jury shall remain inviolate and that other provision that private property may be taken for public use, as soon as damages shall be assessed by jury ..... So we have a controversy in Marshall County District Court; it is taken there by the land owners. The Company is there as any defendant is in court. It is taken there, and the Company is not asking relief in that court. It already has what it wants, to-wit: The strip of land, but the land owners are asking affirmative relief, to-wit: damages. I add the statement, to me of little importance, and certainly not controlling, that the Iowa statute in providing for the appeal, states The land owner shall be plaintiff, and the corporation defendant. ..... but I think it is an actual defendant, in view of the situation of the parties before the State District Court."

The Supreme Court of Kansas in the case of Chicago K. & W. R. R. Co. vs. Butts, 55 Kansas, 660, held that "In an appeal to the District Court from the award of damages in a railroad condemnation, the land owner becomes the plaintiff and the railroad company the defendant."

The Kansas Supreme Court cites in support of this conclusion Boom Company vs. Patterson, 98 United States, 403; Railroad Company vs. Owen, 8 Kansas, 274; Railway Company vs. Orr, 8 Kansas, 280; Risner vs. Strong, 24 Kansas, 297.

As the title to the land passed to the Railroad Company upon the payment of the amount of the award to the sheriff under the specific provisions of the Iowa statute and iff under the specific provisions of the Iowa statute and under

the decisions of the Iowa Supreme Court, we submit that the question as to whether the property of Boynton was thereafter subject to condemnation proceeding, was not involved.

For this reason the decisions which treat a non-resident land owner who is contesting and opposing condemnation of his land for railroad or other public purposes, as a defendant, are not in point, and do not militate against our claim—that where the title of the land has actually passed, and there is nothing in litigation but the amount of compensation to be paid, that the land owner is in such case the real plaintiff.

The case of Union Terminal Railroad Company vs. Chicago Burlington & Quincy R. R. Co., 119 Federal Reporter, 209, in which Circuit Court Judge Thayer concurred in the opinion of District Judge Phillips, does not conflict with our contention.

In this last cited case the property owner was a railroad corporation and was held to have the right to remove the case to the Federal Court. A reading of the opinion discloses that the real question in dispute was *the right to condemn and appropriate the property*, and not a question of damage, which is the only question in dispute in the case at bar.

"We quote from the opinion of the Court, page 215:

"Under the statute of this State (Missouri) authorizing the plaintiff railroad company to condemn land to its use, which provides that such petition may be lodged in the Circuit Court of the county where the real estate is situated, or before a Judge thereof in vacation and providing for the issuing of summons to the defendant land owner, returnable within ten days, the State Supreme Court holds that under Section 20, Article 2, of the State Constitution which provides that 'Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public, shall be a judicial question, and as such judicially determined without regard to any legislative assertion that the use is public: such matter is from its inception to its end judicial in its character.'"

The Court further holds, page 216:

"That the defendant owner of the land has the right in response to such summons, to appeear before the Circuit Court, or County Judge thereof in vacation, to challenge *the right to condemn,* and is entitled to be heard thereon, and from such official adjudication the right of appeal is accorded."

And again:

"As it appears from the answer of the non-resident defendant company filed in this case contemporaneously with the petition for the removal of the cause, that the defendant company *challenges the right of this plaintiff to have the land condemned to its use, because* it had already been appropriated to the use of the defendant railroad company, its rights are therefore protected by the statute of the state."

And again on page 217:

"In a condemnation proceeding, the courts of Missouri act as in other trials at law..... It would therefore seem that if a non-resident's property is sought to be taken and subjected to a public use, as claimed by this plaintiff, he should be entitled if he so elects, to have a Federal Court determine whether or not the conditions upon which the local laws authorize his property to be condemned, have been fairly and fully complied with, because by the statute the local court is empowered to hear and decide such questions as between a local corporation and a citizen of the state..... When the case has been removed into the Federal Court it can and should pursue the course of procedure in the trial of the issues, and the appointment of commissioners, as prescribed by the local statute."

This decision does not question the correctness of the rule for which we contend—that is that in a condemnation proceeding where the only question to be determined relates to the amount of damages to be recovered for property already appropriated by the condemning railroad company the land owner is in fact the plaintiff.

What we have said respecting the case of the Terminal Railroad Company vs. Chicago, Burlington & Quincy R. R. Co., 119, Federal Reporter 200, is applicable to that branch of the case of Madisonville Traction Company vs. St. Bern-

ard Mining Company, decided by District Judge Evans 130 Federal Reporter, 790.

This cause was held removable to circuit court on the petition of the non-resident land owner, but in this case the *right to condemn the property* was the question at issue. No notice was given to land owner until after the commissioners had assessed the value of the property, and had awarded the property to the condemning railroad. We quote from the opinion of the District Judge, page 790:

"Without notice to the Mining Company the county court appointed commissioners who valued the land sought by the Traction Company to be needed for its uses, and returned their report to the county court. Upon this being filed, process was served upon the Mining Company."

Again on page 793:

"The litigation or suit against the Mining Company was begun when the process was first issued, and that company then for the first time was tendered a day in court..... Counsel would have the Court divide this suit into two separate and distinct parts, treating one of these parts, viz: The controversy respecting the title to the land, as having been finally and conclusive settled by the preliminary proceeding taken in the county court *without notice to the owner*, and therefore as not being removable."

In the case at bar the notice required by the Iowa statute was served upon the land owner, and the land owner was thus apprised of the condemnation proceedings, of the appointment of the sheriff's jury and of the date upon which the assessment was to be made.

In the case cited, no such notice or process was served, and the *right to condemn* was therefore a question at issue and was the chief matter in dispute as shown by the opinion of the Court.

In the case Colorado, Eastern R. R. Co. vs. Chicago, Burlington & Quincy R. R. Co., 141 Federal Reporter, 898, the condemning railroad company sought to take land of another railroad company without giving the actual owner of the land notice of the proceeding. A temporary injunction

was granted on the petition of the non-resident railroad company, restraining the condemning company from taking the land until the question could be investigated in the Federal Court. It was held that the injunction would lie on the application of the real owner who was never notified of the condemnation proceeding, for it was taking the land without due process of law and without notice. The Court holds, page 903:

"The (Colorado) statute does not and could not lawfully undertake to conclude the rights and transmute the title of the real owner without notice and having his day in court..... The right of the complainant, as a non-resident citizen, to appeal to the equity jurisdiction of the Federal Courts, is not affected by the provisions of said Section 1726 of the Colorado statute which authorized it to enter its voluntary appearance and become a party to said condemnation proceeding. It is merely permissive in character and cannot be construed to operate as a denial of the non-resisdent's right to invoke the jurisdiction of the Federal Court *to protect its property rights when invaded without due process of law.*"

This case of Colorado Eastern Railroad Company vs. Chicago Burlington & Quincy Railroad Company does not involve any question of removal, and does not attempt to determine whether under facts like those in the case at bar, the non-resident land owner is defendant or plaintiff. It reiterates the doctrine that the Federal Court will protect a non-resident land owner whose property is sought to be taken without due process of law.

II.

THE FEDERAL COURT WILL RESPECT THE CONSTRUCTION PLACED ON CONDEMNATION STATUTES BY THE STATE COURT, AND SUCH CONSTRUCTION BECOMES A RULE OF PROPERTY.

First Question:—

The question of whether the United States Court ac-

quired jurisdiction in this cause, is to be answered by ascertaining what controversy existed when the petiton for removal was filed; and determining the relation of the respective parties to such controversy.

The proceeding for the condemnation of land is based wholly on the state statutes.

"The right of eminent domain, that is the right to take private property for public uses, appertains to every independent government. It requires no constitutional recognition. It is an attribute of sovereignty. The clause of the constitution of the several states providing for just compensation for property taken, is a mere limitation upon the exercise of the right; when the use is public; the necessity or expediency of appropriating any particular property, is not a subject of judicial cognizance."

Mississippi & Rum River Boom Co. vs. Patterson, 98 United States, 403; Colorado, etc., R. R. Co. vs. Jones, 20 Federal Reporter, 193; Cherokee Nation vs. Southern Kansas R. R. Co., 33 Federal Reporter, 900; Lewis on Eminent Domain, Section 1.

In Monongahela, et. Co. vs. United States, 148 United States 312, this Court held:

"The legislature may determine what private property is needed for public purposes; that is a question of political and legislative character; but when the taking has been ordered, then the question of compensation is judicial."

To the same effect is in re Buffalo, 130 N. Y. 422.

Dillion Municipal Corporations, Sections 600, 619.

The distinction between the authority to take the land and the authority to determine the compensation for the land taken, is distinctly recognized in

United States vs. Jones, 109 *U. S.* 513.

This Court in Madisonville Traction Co. vs. St. Bernard Mining Company, 196 U. S. 250, collects the cases on this question and holds:

"If the purpose be public, the taking may be outright, provided reasonable and adequate provision is made at the

time of appropriation, to ascertain and secure the compensation to be made to the owner."

The rights of the parties and the relations each bear to the controversy, is necessarily determined by reference to the statutory provisions as construed by the State Court of last resort. The construction given by the state Court is controlling for it is the established doctrine of the United States Courts that the decisions of the highest tribunal of the State will be followed in all matters pertaining to the construction of State Statutes, and the decisions of the State Court respecting the condemnation of real estate establish a rule of property.

When the petition for removal in the case was filed, under the decisions of the Iowa Court in Myers vs. Chicago & Northwestern Ry. Co., 118 Iowa, 324, the case was then, in the language of the Iowa Supreme Court.

"In effect an action against the corporation for the value of the property taken. The case is not different than it would have been had the statute authorized the initiative to be taken in the District Court and the damages for the taking assessed in the first instance in that tribunal. This is the statutory reason for designating the land owner plaintiff and the company defendant. Here the action was carried to the District Court by the plaintiff. He was the party who invoked its jurisdiction, and as relief was then sought against the company, we think both by statute and in the nature of the proceeding, it must be regarded the defendant."

In Leffingwell vs. Warren, 67 U. S., 2 Black, 590, this court held:

"The construction given to the statutes of a state by the highest tribunal of such state, is regarded as a part of the statute, and is as binding upon the courts of the United States as the text."

The provisions of the Revised Statutes of the United States that the law of the several states shall be regarded as rules of decision in trials at common law, is construed to require such decisions to be construed as the law of the State where announced by its highest tribunal. This Court

has held in Bucher vs. Cheshire R. R. Co., 125 U. S. 555:

"The decisions of the highest court of the State in regard to the validity or meaning of the constitution of that State or its statutes, are to be considered as the law of that State within the requirements of this section."

In discussing the rights of states respecting the exercise of the power of eminent domain, this court in West River Bridge Co. vs. Dix 6 How. 507, held:

"It then being clear that the power in question not being within the purview of the restriction imposed by the 10th section of the First Article of the Constitution, it remains with the states to the fullest extent in which it inheres in their sovereign government, to be exercised by them in that degree that shall be by them deemed commensurate with public necessity. So long as they shall steer clear of the single predicament denounced by the constitution, shall avoid interference with the obligation of contracts, the wisdom the modes, the policy, the hardship of any exertion of this power, are subjects not within the proper cognizance of this court. This is in truth purely a question of power; and conceding the power to reside in the state government, this concession would seem to close the door upon all future controversy in connection with it."

This Court held in the case of Long Island Water Supply Co. vs. Brooklyn, 166 U. S., 685:

"So far as respects any mere matter of procedure, or conflict between the statute authorizing the condemnation, or the proceedings had thereunder, and the constitution of the state, the decisions of the Court of Appeals is conclusive."

This last cited case came to this Court upon a writ of error from the Supreme Court of the State of New York, which involved a condemnation proceeding brought by the City of Brooklyn to condemn the property of the plaintiff in error.

In the case of

Bucher vs. Cheshire, 125 U. S. 555.

Mr. Justice Miller in speaking for this Court, said:

"It is also well settled that where a course of decisions, whether founded upon the statutes or not, have become rules of property as laid down by the highest courts of the state,

by which is meant those rules governing the descent, *transfer or sale of property, and the rules which affect the title and possession thereto,* they are to be treated as laws of that state by the Federal Courts. The principle also applies to the rules of evidence. In Ex. parte Fisk, 113 U. S., 720, this Court said:

"It has been often decided in this court that in actions at law in the courts of the United States, the rules of evidence and the law of evidence generally of the State, prevail in these courts."

See also

Wilcox vs. Hunt, 38 *U. S.*, 13 *Pet.* 378.
Ryan vs. Bindley, 68 *U. S.* 1 *Wall*, 66.

The authoritative character of the decisions of the State Courts upon Federal Courts, in cases arising in such jurisdiction has been recognized in a variety of cases.

In Lowndes vs. Board, etc., 153 U. S., 1, the alleged right of a license in certain Oyster fisheries, and involved, and it was held:

"In respect to the matter o ftitle there are involved not merely the construction of public grants, charters, but also the extent and purpose, to, and for which the title of and control of submerged lands may be passed away from the state to town and individuals. The question is of the rights attached to certain lands within the territorial limits of the state, and whatever becomes a settled rule of real property by the decisions of its courts, is conclusive on this Court. Bondurant vs. Watson, 103, U. S. 281; Burgess vs. Seligman, 107 U. S. 20; 33; Gage vs. Pompelly 115, U. S. 454; Hardin vs. Jordan, 140, U. S., 371, 382, 402; Shively vs. Bowlby (Ante P. 331)".

Wherever the question pertains to any matter of local law even though the decisions of the Federal Court conflict with the state decisions, the latter will control. This has been held in respect to action for recovery of taxes, and the question as to whether recovery for one year is res judicata as to the taxes for other years.

"But apart from that, it is enough that in Tennessee the doctrine of res adjudicata is not applicable to taxes for

years other than those under consideration in the particular case, inasmuch as what would affect a judgment of the State Court so far as *re judicata* is a question of state or local law, and the taxes involved in this State, are taxes for years other than those involved in the prior adjudication."

Union, etc., Bank vs. City of Memphis, 189 *U. S.* 71.

The Supreme Court of Louisiana having decided under the laws of that state that an unrecorded mortgage has no effect unless reinscribed after 10 years, the Supreme Court of the United States held the decisions of the State Court, establishing as they do, a rule of real property in the State of Louisiana, are binding in this court and are conclusive in this case.

Bonduraut vs. Watson 103, *U. S.* 281.

The provisions of the California statutes as interpreted by its Supreme Court authorizing mortgage foreclosures by making the administrator of a deceased mortgagor, sole defendant, is binding on the Federal Courts in that state as it establishes a rule of property.

Hearfield vs. Burgess 75 *Federal Reporter* 17.

Where the State Courts have determined the competency as evidence of records of certain deeds, it was held in the Court of Appeals, Eighth Circuit, that such construction is binding upon the Federal Courts, as establishing a rule of property.

"The construction by the highest judicial tribunal of a state of its constitution or statutes, which establishes a rule of property is controlling authority in the courts of the United States."

Union Pacific Railroad Co. vs. Reed, 25 *C. C. A.* 389.

The Supreme Court of Illinois held that a tax sale of property is invalid if any part of the tax were unauthorized and such decision is binding upon the Federal Courts.

"These decisions establish a rule of property which determines the present case, for without reference to other ob-

jections urged to the validity of the sale under which appellant claims title, it satisfactorily appears that a part of the taxes were unauthorized."

Gage vs. Pompelly, 115 *U. S.* 454.

The authoritative character of the decision of the State Court will be recognized, even where the effect is to prevent a case from being removed which would otherwise be removable to the Federal Courts.

So closely and carefully has this rule been followed that if the highest court of the state advises new views as to the proper construction of a state statute and reverses its former decision, the Federal Courts will follow the latest decision of the State Court.

Leffingwell vs. Warren, 67 *U. S.* 2 *Black*, 599.
United States vs. Morrison 4 *Pet.* 124.
Green vs. Neals Lessee, 6 *Pet.* 291.

The Supreme Court of New Hampshire, the highest court of that state having given a construction to a state statute that it was in substance a penal statute, and that a suit or proceeding upon it was a criminal proceeding for an infraction of a law of the state, the Federal Court must adopt that construction.

We quote from New Hampshire vs. Grand Trunk Ry. 3 Federal Reporter, 887-888:

"If so, it is quite clear this cause must be remanded to the State Court. This court had no jurisdiction of the subject matter of it when commenced; it has not now. The statute of 1875, Sec. 2 (Chapter 137, Volume 18, page 470, United States Statutes at Large) in which it is claimed the removal of this cause is authorized, provides only for the removal of causes of a civil nature. This is criminal."

Where Acts of Congress provide for condemnation of property for the use of the United States in accordance with the procedure of the law of the State for the condemnation of real estate, the decisions of the State Courts are controlling and will be followed by the Federal Courts, even though the

mode of procedure is at variance with the ordinary procedure in civil cases.

"Upon a re-examination of the question I am confirmed in the opinion that the statutes of this state as expounded by its Supreme Court, prescribe a special and peculiar mode of procedure distinct from the practice in civil actions. Therefore the provisions of the Act authorizing courts in which actions are tried to set aside verdicts for error in assessment or damage are not applicable and do not authorize the same courts to grant new trials in condemnation cases."

United States vs. Freeman, 113 *Federal Reporter*, 370-372.

We submit that if this Court holds that this case is removeable by Boynton the land owner, and that the United States Circuit Court acquired jurisdiction, it would in effect directly conflict with the holding of the Supreme Court in Myers vs. Chicago & Northwestern Railway Company. *Supra.*

It will be in conflict with the decision of the highest State Court in respect to the construction of an Iowa statute, the State Court holds that when a non-resident land owner submits himself to the condemnation proceeding instituted in a State Court, and brings the proceedings from the sheriff's commissioners into the State Court, he submits himself to the jurisdiction of the State Court, and has nothing thereafter to contest save the amount due him for the value of the property taken, in which proceeding he occupies the status of a plaintiff and not that of a defendant.

In the case of Meyers vs. Chicago & Northwestern Ry. Co. 118 Iowa, 312, the railway company removed the case to the Federal Court, as a defendant and it was held to be a *defendant* under the construction given to the Iowa Statute.

In the case at bar if Boynton was defendant when the removal was asked, then the railway company in the Meyers case could not have been thedefendant, although, the Supreme Court of Iowa so held.

The Iowa court construing the State Statutes, has announced a rule that is binding on the courts of that state.

On the appeal of the land owner to the District Court of the State in condemnation proceedings, the Railway company under the Iowa decisions may remove the cause to the Federal Court.

If it be held now that the Railway company is not the defendant and such holding is based upon the construction of the State Statutes the construction of the Iowa Statute by the highest court in that state is not followed.

The question presented to this court affords the best possible illustration of the reason requiring the decisions of such tribunal to be followed as authorities. The decision establishes a rule of property; the procedure is altogether statutory. There is no claim that the procedure is in violation of any constitutional right. There is no claim that the non-resident owner was not duly advised of the attempt of the condemning railroad company to take his property, and of the proceeding before the sheriff's jury for the assessment of the value thereof.

The non-resident land owner voluntarily appeared in such condemnation proceding within the time fixed and voluntarily perfected his appeal from such condemnation proceeding before the sheriff's jury, as provided by the State Statutes, and brought the case from the non-judicial body before a judicial body, the State District Court.

The non-resident land owner was then voluntarily seeking to prosecute his claim for damages, the only question left open to contest, and the only question which he has attempted to contest at any time. After voluntarily invoking the jurisdiction and assistance of the State Court, he filed his petition for removal to the Federal Court. The case would not have been in the State Court save for the action of the non-resident land owner. He used the State Court for the purpose only of leaving the State Court.

These facts create questions involving the construction of the State Statutes, and the effect of the procedure provided

by such statutes. The Iowa Supreme Court has unequivocally passed thereon in the cause of Myers vs. Chicago & Northwestern Ry Co., 118 Iowa, 312.

General rules of law are not involved save as they aid in determining the mode of procedure prescribed by the statute, and the nature of the issue and character of the controversy existing at any particular stage of the procedure. The true character of the procedure, the matter in issue, the relation each party bears to the controversy have all been determined by the decisions of the State tribunal, the last resort, and we submit its decision should be conclusive.

III.

THE CIRCUIT COURT CANNOT TAKE COGNIZANCE OF THIS SUIT THROUGH A REMOVAL BY ANYONE SAVE THE "DEFENDANT THEREIN BEING NON-RESIDENTS OF THAT STATE." A FAILURE TO SO REMOVE IS A TRULY JURISDICTIONAL DEFECT.

Second Question:

The second question presented to this Court by the Circuit Court of Appeals (Certificate page 2) is "If the land owner was not a defendant within the meaning of the removal statute, could the Circuit Court take cognizance of a suit through a removal by him? Stated in other words the question in this. Is the provision of the removal statute to the effect that the removal on the grounds of diverse citizenship made by the defendant or defendants therein being non-residents of that state restrictive and jurisdictional, in the sense that cognizance of the suit can be taken by the Circuit Court through a removal only when it is by the defendant, or is the provision only modal and formal in the sense that non-compliance therewith or non-conformity thereto, may be waived?"

In the case of Martin et al vs. Snyder et al, 148 U. S. 663, it was held under the Act of Congress, March 3, 1887, that defendants who are residents of the State in the court of which action is pending cannot remove the same into the

Circuit Court of the United States, and it appearing that the cause was removed on the application of *resident* defendants, a decree rendered in the Circuit Court against the defendants who so removed the cause, was set aside for want of jurisdiction.

The decision rendered by the Chief Justice is not lengthy and we quote the entire decision:

"This was a bill of complaint, filed by Samuel F. Engs, George Engs and Henry Snyder, Jr., of the City, County and State of New York, against Morris T. Martin, Carrie E. Martin, in the Circuit Court of Lake County in the State of Illinois, on the 27th day of October, 1887. November 7th, 1887 the defendants preferred a petition for the removal of the cause to the United States Circuit Court within and for the Northern District of Illinois on the ground of diverse citizenship, and the cause was transferred accordingly.

The petition stated: "That the controversy in said suit is between citizens of different states, and that the petitioners were at the time of the commencement of this suit and still are citizens of the State of Illinois, and that all the plaintiff's were then and still are, citizens of the State of New York."

Under the Act of Congress, March 3, 1887, (24 Stat. at L. 552 Chap. 373), it is the defendant or defendants who are non-residents of the state in which the action is pending who may remove the same into the Circuit Court of the United State for the proper district. The defendants here were not entitled to such removal, and a decree which was in favor of the complainants, and from which the defendants prosecuted this appeal, must be reversed for want of jurisdiction, with costs against the appellants and the case remanded to the Circuit Court, with directions to render a judgment against them for costs in that court, and to remand the case to the State Court.

Torrence vs. Shedd, 144 *United States* 527-533."

This decision was rendered under the present act respecting removals from State to Federal Courts.

It clearly holds in language that cannot be misunderstood, that where the defendant is a resident of the state in which suit is brought, he may not remove the cause, and that

when the cause is so removed, jurisdiction is not acquired by the Federal Court.

If the inquiry submitted to this court asked whether the provisions of the removal statute to the effect that the removal should be made by a defendant who is a non-resident of that state, is only modal and could be waived, the decision of this court in Martin vs. Snyder would be a complete answer.

Is there any distinction when a plaintiff non-resident secures the removal, than when a defendant resident secures the removal? No reason can be urged for a distinction.

To the same effect see the case of Fife vs. Whitel, 102 Federal Reporter 537, (C. C. A.,) in which Circuit Judge Morrow held:

"This restriction of the right of removal to non-residents of the state, based upon the residence of the defendant, is clearly jurisdictional, and if it does not appear in the record of the State Court it must be clearly shown in the petition of removal as a right which it has and claims, or it will be presumed not to exist."

In the case of Torrence vs. Shedd, 144 United States 527 this court held:

"For the reasons above stated, the original removal of the petition of the appellant was wrongful and therefore the judgment must be reversed for want of jurisdiction, with costs against the appellant and the case remanded to the Circuit Court, with direction to render a judgment against him for costs in that court, and to remand the cause to the State Court."

This decision involved the construction of the removal statute of March 3, 1875, and whether the controversy was separable within the meaning of such statute.

This Court in the case of Ayers vs. Watson, 113 U. S. 594, had occasion to construe Section 2 of the Act of 1875, and speaking through Mr. Justice Bradley held that Section 2, of the Act of 1875 was "the fundamental section based on the constitutional grant of judicial power." We quote the

following, where the Court construes Section 2, of the Act of 1875.

"This is the fundamental section based on the constitutional grant of judicial power. The succeeding ones relate to the forms of proceeding to effect the desired removal ..... The second section defines the *case in which* a removal may be made. The third prescribes the mode of obtaining it, and the time within which it should be applied for. In the nature of things the second section is judictional and the third is put modol and formal.

The conditions of the second section are indispensible and must be shown by the record. The directions of the third though obligatory, may to a certain extent be waived. Diverse citizenship of the parties or some other jurisdictional fact prescribed by the second section is absolutely essential and cannot be waived, and want of it will be error at any stage of the cause, even though assigned by the party at whose instance it was committed.

Mansfield C. & L. M. R. Co. vs. Swan, 111 *United States*, 370."

The decision of the Court in Ayers vs. Watson, 113 U. S. 594 has been reaffirmed in many subsequent decisions of this Court, and received its sanction in Martin vs. Baltimore & Ohio R. R. Co. 151 U. S., 673, in which opinion Mr. Justice Gray on page 690 quotes fully and approvingly therefrom.

Section 2 of the Act of 1875, which was construed in Ayers vs. Watson, 113 U. S. 594, and Martin vs. Baltimore & Ohio Railroad company, 151 U. S. 673-690, is also Section 2 in the Acts of 1887-1888.

In this last named Act it is provided:

"Any other suit of civil nature at law or in equity.... ....may be removed into the Circuit Court of the United States for the proper district, by the defendant or defendants being non-residents of that State."

In the language of Justice Bradley in construing Section 2 of the Act of 1875, we submit that it was the purpose of Congress in the legislation of 1887-88 to leave Section 2, "as the fundamental section based on the constitutional grant of judicial power."

The Act 18, 1887-88 was passed to contract the jurisdiction of the Circuit Court.

In Hanrick vs. Hanrick, 153, U. S., 192, this court said:

"It was intended to contract the jurisdiction of the Circuit Court of the United States, whether original over suits brought therein, or by removal from the State Court."

In Fisk vs. Henarie 142 U. S. 459 the Court said:

"The attempt was manifestly to restrain the volume of litigation pouring into the Federal Courts, and to return to the standard of the Judiciary Act."

In re Pennsylvania, 137, U. S. 451 the Court said:

"The general object of the Act is to contract the jurisdiction of the Federal Court."

In Smith vs. Lyon, 133 U. S. 315, the Court said:

"It was a statute mainly designed for the purpose of restricting the jurisdiction of the circuit court of the United States."

In the case Parkinson vs. Barr, 105, Federal Reporter, 81-83 District Judge Hawley in discussing whether all the defendants must join in removing the case from the State to the Federal Court said:

"The question to be discussed is: "Can the removal of this case from the State Court be sustained upon the ground that the parties are residents and citizens of different states, unless it clearly appears that all the defendants who join in the petition for removal are non-residents of the State where the suit is brought. This question is important. In involves a construction of the provisions of the removal act of 1887-88. In construing the provisions of this Act it must constantly be kept in mind that it was passed for the express purpose of limiting the jurisdiction of the United States Circuit Court, as given by the removal Act of 1875."

And again:

"Under this statute it is clear that in actions where there is no separable controversy, a right of removal can be exercised only by non-resident defendants. Telegraph Company vs. Brown, 32 Federal Reporter, 337: Anderson vs. Appleton, 32 Federal Reporter, 855: Weller vs. Tobacco Company, 32 Federal Reporter 860:" and numerous other cases cited.

The author in Black's Dillion on Removal of Causes, Section 65 states: "But the Act of 1887 which is re-actionary in its general character, has almost wholly restricted this right (of removal) to the defendant; there is one single case in which a plaintiff may still exercise the right of removal, to-wit: 'Where the suit is one between citizens of the same state, claiming lands under grants of different states; but in all other cases the new Act by declaring that the removal may be made by the defendant or defendants therein' has excluded the plaintiff from the exercise of this privilege."

And again:

"Although every element of removability is present in the case it cannot be transferred unless the defendant asks for it. The plaintiff cannot remove either on the ground of the diverse citizenship of the parties, or on the ground of prejudice and local influence, or on the ground that there is a separable controversy between the defendants or one of them and himself, or because the case has arisen under the constitutional laws of the United States."

And again from Section 65:

"In a proceeding for the condemnation of private property under the power of eminent domain, if the land owner asserting his right to compensation or appealing from the award of damages, is to be regarded as the plaintiff, (which may or may not be the case, according to local practice), then he has no right to remove the case to the Federal Court."

From section 13 of the same author, we quote:

"The intention of the Removal Act of 1887 to restrict removals of cases from State Courts to Federal Courts and to limit the jurisdiction of the latter courts of such cases is perfectly plain, hence this statute should be strictly construed against anyone seeking to evade the additional requirement which it puts upon the right of removal."

IV.

THERE CAN BE NO WAIVER OF THE DEFECT IN THE JURISDICTION OF THE CIRUCUIT COURT, IF THE REMOVAL IS NOT MADE BY THE DEFENDANT AS REQUIRED BY SECTION 2 OF THE REMOVAL ACT.

Second Question:—

In Graves vs. Corbin, 132 U. S. 571, this Court on page

592 held:

"Under the provisions of Section 5 of the Act of March 3, 1875 (18 Stat. 472) that if in any suit removed from said Court to the Circuit Court of the United States, which shall appear to the satisfaction of said Circuit Court at any time after said suit has been removed thereto, that it does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, it shall proceed no further therein, but shall remand the suit to the Court from which it was removed as justice may require This Court has held that when it appears to this Court that the case is one under which provision the Circuit Court should not have taken jurisdiction, it is the duty of this Court to reverse any judgment given below and remand the cause, with costs against the party who wrongfully invoked the jurisdiction of the Circuit Court. Williams vs. Nottawer Twp. 104 United States 209. This rule has been recognized by this Court to the extent even of taking notice of the want of jurisdiction in the Circuit Court, although the point has not been formally raised in that court or in this court: In Turner vs. Farmers Loan & Trust Company, 106 United States, 522-555; Mansfield C. & L. M. R. Co. vs. Swan, 111 United States, 379-386; Fannington vs. Pillsbury, 114 United States, 138-144; Cambridge Co. vs. Oto Co. 120 United States 225."

To the same effect we cite the case of Stevens vs. Nichols 130 U. S. 230; Crehoe vs. Ohio, etc., 131 United States 240; Jackson vs. Allen 132 United States 27.

In Jackson vs. Ashton, 8 Peters 148, this Court itself raised and insisted on the point of jurisdiction in the Circuit Court; in that case it was expressly ruled that because it did not appear that the Circuit Court had jurisdiction, this Court on appeal had no jurisdiction except for the purpose of reversing the decree appealed from on that ground.

In Mansfield C. & L. M. R. Co. vs. Swan, 111 United States 370, this Court referred to situation of a party who brought the case to the Federal Court subsequently taking advantage of the failure of the Court to thus acquire jurisdiction.

"But the rule springing from the nature and limits of the

judicial power of the United States is inflexible, and without exception which requires this Court of its own motion to deny its own jurisdiction and in the exercise of its appellate power that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which in the exercise of that power it is called to act. On every writ of error or appeal, the first fundamental question is that the jurisdiction, first of this court, and then of the court from which the record comes. This question the Court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it.....

Again, the court holds in the same case, page 389:

"It acts upon the principle that the judicial power of the United States must not be exercised in a case to which it does not extend, even if both parties desire to have it exercised. Cutler vs. Rae, 7 How. 789.'

The Court quoted with approval in this last cited case, from the minority opinion of Mr. Justice Curtiss, in the Dred Scott case, 19 How. 393-400.

I consider therefore, that when there is a plea to the jurisdiction of the Circuit Court in a case brought here by writ o ferror the first duty of this court is to Sua Sponte, if not moved to it by either party to examine the sufficiency of that plea and thus to take care that neither the Circuit Court nor this court shall use the judicial power of the United States in a case to which the constitution and laws of the United States have not extended that power."

In United States vs. Huckabee, 16 Wall. 414, the "plaintiffs in error were seeking to reverse on the merits an adverse decree vesting title in the opposing party, in a proceeding instituted by themselves; the Court reversed the decree to their advantage for want of the jurisdiction of the court below, which they had invoked and set in motion."

In Thompson vs. Railroad company, 6 Wall. 134, the question was one purely of procedure; whether the remedy was at law or in equity although in that class of cases the jurisdiction relates to the subject matter and is administered by the same court, but in another form of proceeding. It was there held the parties could not waive by their conduct, such question of jurisdiction.

In the case of Martin, Adm. vs. Baltimore & Ohio R. R. Co., 151, United States, 690, this Court quotes with approval from the case of Ayers vs. Watson, 113 United States, 594, and holds:

'Section 2 of the Acts of 1875 define the class of cases which might be removed into the Circuit Court of the United States, as the fundamental section, based on the constitutional grant of judicial power. The succeeding sections relate to the forms of proceeding to effect the desired removal.... The second section defines the cases in which a removal may be made. The 3rd prescribes the mode of obtaining it and the time within which it should be applied for. In the nature of things the second section is judicial, and the third is but modal and formal; the conditions of the second section are indispensible and must be shown by the record, the directions of the third, though obligatory, may to a certain extent be waived. *Diverse citizenship of the parties, or some other jurisdictional fact prescribed by the second section, is absolutely essential, and cannot be waived, and the want of it will be error at any stage of the cause, even though assigned by the party at whose instance it was made.*"

We quote from Section 65 Black's Dillon Removal of Causes:

"If the question is not as to any mere defect or informality of the proceeding, but goes to *the substantive right of removal*—in other words, the jurisdiction of the Federal Court the rule is altogether different: such objection cannot be waived by a party, nor can his consent confer on the Federal Court a jurisdiction which it would not otherwise possess."

Section 2 of the Act of Congress, 1887-88, provides the class of cases and the parties in such class of cases who may remove the cause to the Federal Court: this relates to the *right of removal* and necessarily limits the jurisdiction of the Federal Court.

In the recent case of Minn. vs. Northern Securities Company, 194, U. S. 48, all the defendants joined in a petition for removal from the State Court to the Circuit Court, both parties contended that the removal was properly taken, and that the cause was one over which the Circuit Court acquired

jurisdiction by the Removal Act. This Court held on page 62:

"But consent of the parties can never confer jurisdiction upon a Federal Court; if the record does not affirmatively show jurisdiction in the Circuit Court we must upon our own motion so declare, and make such order as will prevent that Court from exercising an authority not conferred upon it by statute."

If section two of the act of 1887 is truly jurisdictional as we submit this court held it is not modal and cannot be waived. In the language of the dessenting opinion of Justice Curtiss in Dredd Scott case 19 How. 393. "The true question is not what either of the parties may be allowed to do, but whether this court will affirm or reverse a judgment of the Circuit Court when it appears on the record by a plea to the jurisdiction that it is a case to which the judicial power of the United States does not exist."

V.

THE JUDICIAL PROCEEDING WHICH THE LAND OWNER IS AUTHORIZED BY THE STATUTES OF IOWA TO INITIATE IN THE DISTRICT COURT OF THE STATE BY APPEALING FROM THE ASSESSMENT OF THE COMMISSIONERS SELECTED BY THE SHERIFF, IS A PROCEEDING WHICH COULD BE ORIGINALLY INSTITUTED IN THE CIRCUIT COURT OF THE UNITED STATES WITHIN THE MEANING OF THE REMOVAL ACT.

Third Question:—

The third question submitted in the certificate (page 3) is, "Is the judicial proceeding which the land owner is authorized by the statutes of Iowa to initiate in the District Court of the State by way of a so-called appeal from the assessment of the commissioners selected by the sheriff, a suit which can be originally instituted in the Circuit Court of the United States, when the citizenship of the parties and the sum or value of the matter in dispute are such as to make the suit otherwise cognizable in that court:

It appears to us that the answer to this interrogatory is governed by the case of Madisonville Traction company vs. St. Bernard Mining Company, 196 U. S. 239.

The Traction Company was a Kentucky corporation, and the Mining company was a Deleware Corporation; the Traction Company sought to condemn the land of the Mining Company for right of way purposes. An application was made under the Kentucky statutes by filing in the office of the Clerk of the County Court, a description of the land required, and commissioners were appointed to assess the damages which the owner was entitled to receive.

The commissioners are required to make their award of damages and it is the duty of the Clerk of the Court upon application of the condemning company after award to issue process against the owners to show cause why the record and award should not be confirmed, and to make such other, other as are required by the Civil Code of practice.

Upon a confirmation of the report of the commissioners which confirmation is made after process has been served upon the owners, the condemning company upon payment of the damages and costs becomes entitled to take possession of the land and to use the same for the purpose of which it is condemned, as fully as if the title had been conveyed to it.

The commissioners appointed by the County Court in above proceeding awarded One Hundred Dollars as damages to be paid by the Mining Company. Process having issued, the Mining Company before any action was taken upon the report, filed its petition and bond for removal of the cause into the Circuit Court of the United States.

The County Court refused to recognize any right of removal to the Circuit Court of the United States, and thereupon the Mining Company, the Delaware corporaion, filed in the Circuit Court a transcript of the proceedings of the State Court. The effect of the proceeding is determined in this case brought by the Mining Company as an original suit in

equity in the Federal Court seeking to prevent the condemnation of the land of the Mining Company to railroad purposes and asking an injunction restraining further prosecution of condemnation proceedings.

This Court held that:

"The case presented in the County Court was a suit or controversy between citizens of different states within the meaning of the constitution and the laws of the United States; it was as already said, a judicial proceeding initiated in a tribunal which constitutes a part of the judicial establishment of Kentucky as maintained by its statutes (Kentucky Statute 140), and the Court, although charged with some duties of an administrative character, is a judicial tribunal and a court of record."

On the question as to whether the suit could have originally been brought in the Federal Circuit Court, this Court holds:

"Why could not the proceeding instituted in the County Court have been brought originally in the Federal Court? The case as made in the County Court was beyond question a judicial proceeding; it related to property rights; the parties were corporate citizens of different states; and the value of the matter in dispute exceeded the amount requisite to give jurisdiction to the Circuit Court. It was therefore a proceeding embraced by the very words of the constitution of the United States, which declares that the judicial power shall extend to controversies between citizens of different states, as well as by the Act of 1887, Section One, which declares: 'That the Circuit Courts of the United states shall have original cognizance concurrent with the Courts of the several states, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds exclusive of interest and costs, the sum of Two thousand dollars.....in which there shall be a controversy between citizens of different states.' In view of these explicit provisions it is clear that the proceeding in the County Court was a suit or controversy within the meaning both of the constitution and of the judiciary Act. We could not hold otherwise without overruling former decisions of this court. Let us see whether this be not so; referring to the clause of the statute defining the judicial power of the United States, Chief Justice Marshall, speaking for the Court in Osborn vs. Bank

of United States, 9 Wheaton, 738-819, said: 'This clause enables the judicial department to receive jurisdiction to the full extent of the constitution, laws or treaties of the United States when any question respecting them shall assume such a form that the judicial power is capable of acting on it; that power is capable of acting only when the subject is sumitted to it *by a party who asserts his rights in the form prescribed by law.* It then becomes a case and the constitution declares that the judicial power shall extend to all cases arising under the constitution, laws and treaties of the United States."

The facts in the Kentucky case differ essentially from the facts in the case at bar; under the Iowa statute the sheriff appoints the commissioners. Under the Kentucky statute the County Court appoints the commissioners. Under the Iowa statute the proceedings before the commissioners are effective only after notice has been served upon the land owner, apprising him of the condemnation and of the day fixed for the assessment of his damage, at which time he may appear before the commissioners.

Under the Kentucky statute the notice is served after the report of the commissioners is made, and the land owner up to that time has had no opportunity to protect his rights.

Under the Iowa statute the proceedings before the sheriff are non-judicial in character. Under the Kentucky statute the proceedings in the County Court are judicial.

Under the facts in the case at bar Boynton, the non-resident land owner, brought the case into the State Court and voluntarily appeared in the condemnation proceeding and invoked the jurisdiction of the State Court, from which he immediately sought to remove the proceedings to the Federal Circuit Court.

In the Kentucky case the title had not passed to the property, when the case was removed as a suit from the county court a judicial tribunal into the Federal Court.

In the case at bar the property had been condemned for railroad purposes, and after due notice to Boynton the non-

resident land owner, there was nothing left to contest in the State District Court when he appealed thereto, save the one question of the amount of compensation or value of the land.

In the language of Mr. Justice Field in the case:

Mississippi & Rum River Boom Company vs. Patterson, 98 U. S. 403.

"The proceeding in the present case before the commissioners appointed to appraise the land, was in the nature of an inquest to ascertain its value, and not a suit at law in the ordinary sense of those terms, but when it was transferred to the District Court by appeal from the award of the commissioners it took under the statute of the state, the form of a suit at law, and was thenceforth subject to its ordinary rules and incidents. The point in issue was the compensation to be paid to the owner of the land; in other words, the value of the property taken. No other question was open to contestation in the District Court. (Turner vs. Holeran, 11 Minnesota, 253). The case would have been in no essential particular different had the state authorized the Company by suit to appropriate the particular property in question, and the owners to bring suit against the Company in the courts of law for its value."

We submit that at the time that Boynton, as non-resident land owner, voluntarily entered his appearance and appealed to the State District Court, thereby initiating as he had the right to do, legal proceedings to recover compensation in a judicial tribunal of the state, he could, had he so elected, have brought a suit in the United States Circuit Court, alleging the appropriation of his land in the condemnation proceedings and he would have had a right to recover in such court the value of his land.

This question can receive no other answer than the one we give it in the light of the exhaustive opinion in Madisonville Traction Company vs. St. Bernard Mining Company, 196 U. S., 239.

VI.

THE MASON CITY & FORT DODGE RAILROAD

COMPANY BY APPEARING IN THE CIRCUIT COURT WITHOUT OBJECTING TO THE JURISDICTION OF THE CIRCUIT COURT, DID NOT AND COULD NOT GIVE THE CIRCUIT COURT JURISDICTION TO RENDER JUDGMENT IF THE CASE WAS REMOVED THERE UNDER THE PROVISIONS OF THE REMOVAL STATUTE.

Fourth Question:—

The Fourth question submitted is "If the Circuit Court could not have taken cognizance of the suit through the removal by the land owner, and if the Circuit Court could have taken cognizance of the suit through its original institution in that court after the assessment by the commissioners, did the parties by appearing in the Circuit Court and there litigating to a final conclusion the matter in dispute, without any objection to the jurisdiction of the Court, or to the manner in which its jurisdiction was invoked, authorize the Circuit Court to exercise jurisdiction, and to proceed to final judgment in like manner and with like effect as if the suit had been originally instituted in that court, the citizenship of the parties and the sum or value of the matter in dispute being such as to make the suit otherwise cognizable in that Court?"

The answer to this question is controlled by the provisions of the Removal Statute of 1887-88. This statute defines the class of cases which may be transferred from the State Court to Federal Courts.

If Boynton the non-resident land owner, was the plaintiff, as we contend, he could not transfer the cause from the State District Court to the Federal Circuit Court, and his case was within the class that could not be transferred.

Boynton the non-resident land owner, could have brought the suit originally in the Federal Circuit Court, as shown in response to the Third question submitted by the Circuit Court of Appeals. He determined otherwise, and elected to initiate the proceeding in the State District Court; he cannot now urge the jurisdiction of the Circuit Court unless it is permitted by the Removal Statute.

We submit that the case of Martin vs. Snyder 148 United States, 662 is decisive of this question, and unmistakably leads to the conclusion that the Circuit Court could not acquire jurisdiction.

The failure of this plaintiff in error to file a motion to remand and proceeding to trial without objection to the jurisdiction can not enlarge the jurisdiction of the Circuit Court.

The case last cited was decided under the Act of Congress March 3, 1887 the opinion was written by the Chief Justice.

"This was a bill of complaint filed by Samuel F. Engs, George Engs and Henry Snyder, Jr., of the City, County and State of New York, against Morris T. Martin and Carrie E. Martin in the Circuit Court of Lake County in the State of Illinois, on the 27th of October, 1887.".

The diversity of the citizenship of plaintiff and defendant is thus fully disclosed.

"November 7th, 1887, the defendants preferred a petition for the removal of the cause to the United States Circuit Court within and for the Northern District of Iowa on the ground of diverse citizenship, and the case was transferred accordingly."

This shows that the petition for removal was filed by the defendants who were all residents of the State of Illinois, the state in which the suit was brought.

"The petition stated that the controversy in said suit is between citizens of different states, and that the petitioners were at the time of the commencement of this suit, and still are citizens of the State of Illinois, and that all the plaintiffs were then and still are citizens of the State of New York. Under the Act of Congress March 3, 1887, (24 Stat. 8 52 Ch. 373) it is the defendant or defendants who are non-residents of the State in which the action is pending, who may remove the same into the Circuit Court of the United States for the proper district.

The defendants here were not entitled to such removal, and the decree which was in favor of the complainants, and from which the defendants prosecuted this appeal, must be

reversed for want of jurisdiction, with costs against the appellants, and the cause remanded to the Circuit Court with directions to render judgment against them for costs in that court, and to remand the case to the State Court. (Torrence vs. Shedd 144 United States, 527-533.)"

As this case was brought after the Act of March 3, 1887, it was necessary before the cause could be removed, that it must be one 'of which the Circuit Courts of the United States are given original jurisdiction' that is a suit of a civil nature at common law or in equity.

In the case of Martin vs. Snyder, 148 United States 662, the Circuit Court of the United States had original jurisdiction; that is had the complainants who were residents of New York, elected, they could have brought their suit originally in the United States Court against the defendants who were residents of the State of Illinois. This fact, however, appears to be of no moment in determining whether the cause on removal was one that the Circuit Court acquired jurisdiction. The principal announced in this case must control the answer to the fourth question.

Notwithstanding the defendants brought the case under the Removal Statute, to the Circuit Court, and invoked thereby its jurisdiction, this Court will not tolerate a jurisdiction of the Circuit Court in contravention to the specific requirements of Section Two of the Act of 1887.

In the case at bar, the plaintiff in error did not invoke the jurisdiction of the Circuit Court. As it was compelled to do it defended its rights in such court, but raised no jurisdictional question.

"If the question is not as to any mere defect or informality in the proceedings, but goes to the substantive right of removal—in other words, the jurisdiction of the Federal Court, the rule is altogether different. Such objections cannot be waived by a party, nor can his consent confer on the Federal Court a jurisdiction which it would not otherwise possess. Blacks Dillion on Removal of Causes, Section 65."

In Parkinson vs. Barr, 105 Federal Reporter, 81-83, District Judge Hawley held:

"The question to be discussed is the question of the removal of this cause from the State Court by plaintiff upon the ground that the parties are residents and citizens of different states, unless it clearly appears that the defendants who join in the petition for removal are non-residents of the state where the suit is brought.

This question is important. It involves a construction of the provisions of the Removal Act of 1887-88."

In discussing this same Act, the Circuit Court of Appeals Eight Circuit, Thurber vs. Miller 14 C. C. A. 432, held "This Act restores the rule of the Judiciary Act of 1789, as relates to the party who made the removal, by restricting the right of removal 'to the defendant or defendants' under this Act; a plaintiff who commences a suit in a State Court cannot afterwards remove it; he is bound to remain in the forum of his own selection."

We again quote from the same opinion:

"The intention of the Act of 1887 is to confine the right of removal in all cases to defendants who are non-residents of the state in which they are sued. The plaintiff when he sues in the State Court, having selected that forum, must remain there, whether he be a citizen of that or some other State. The defendant who is sued can only remove the suit when it is brought in a state other than that in which he resides. This in the language of Chief Justice Fuller, in Fisk vs. Henarie, Supra., is a "return to the Standard of the Judiciary Act of 1789. Concerning which Mr. Rawle says:

"If a citizen of another state has commenced the suit, he cannot afterward remove it, for he is bound by his own selection, nor can the defendant remove, for he is not to be apprehensive of the injustice of the courts of his own state. (Rawle Const. C. 25, page 223)."

Again we quote from the same opinion:

"It is obvious therefore, that the Act of 1887 so far at least, as relates to the removal of suits on the ground of a separable controversy, intended to return to the rule of the Act of 1866, which first gave the right and limited it to the defendant who is a citizen of a state other than that in which the suit is brought."

To answer the fourth question contrary to our contention

is to say that a plaintiff non-resident may transfer a cause from the state to the Circuit Court because there is diversity of citizenship and because the cause is one that could have been brought originally in the Circuit Court; that a failure of the defendant to ask that the cause be remanded, is a waiver of a modal matter and thus there is created a new class of cases for the Circuit Court.

Federal Courts possess no purisdiction, but what is given them by the power that creates them, and can be vested with none but what the power ceded to the general government will autorize them to confer. United States vs. Hudson, 7 Cranch, 32.

Congress may withhold from any court of its creation jurisdiction of any of the numerous controversies. Courts created by statute can have no jurisdiction, but such as the statute confers.

Sheldon vs. Zill 8 *How.* 441.

It is for Congress to say how much of the judicial power of the United States shall be exercised by the subordinate courts it may establish from time to time. Plaquemines Tropical Fruit Co. vs. Henderson 170 United States, 511.

"A Circuit Court, however, is of limited jurisdiction and has cognizance not of cases generally, but only of a few specially circumstanced, amounting to a small proportion of the cases which an unlimited jurisdiction would embrace. And the fair presumption is not, (as we regard a court, of general jurisdiction; that a cause is within this jurisdiction unless the contrary appears), but rather that a cause is without its jurisdiction till the contrary appears. This renders it necessary inasmuch as the proceedings of no court can be deemed valid, further than its jurisdiction appears or can be presumed and setting forth upon the record of a Circuit Court, the facts or circumstances which give jurisdiction either expressly or in such manner as to render them certain by legal intendment.....if as in the present case the suit be upon a promissory note by an assignee to show that the original promisee is so; for by special provision of the statute, it is his description as well as that of the assignee which effectuates jurisdiction."

Turner vs. Bank of North America, 4 *Dall*, 8.

It is the *description* of the party who may transfer to Federal Court under Act of 1887-88 which "effectuates jurisdiction."

VII.

THERE IS NO ELEMENT OF ESTOPPEL AGAINST THE MASON CITY & FORT DODGE R. R. CO., PREVENTING IT FROM INSISTING THAT THE CIRCUIT COURT WAS WITHOUT JURISDICTION ON REMOVAL UNDER THE STATUTE OF 1887-88.

Fourth Question:—

The case was not brought in the Federal Court by the plaintiff in error, but was brought by the defendant in error, the non-resident land owner.

"The acts of a party sought to be made the basis for an estoppel must be viewed in the light of the understanding he had of his rights, and not in the light of such rights as they may thereafter be determined.

City of Cleveland vs. Cleveland & R. Co. 93, Federal Reporter, 113-125-131.

A party asserting the estoppel must show affirmatively that he has acted in reliance on the act or declaration and will be prejudiced of the truth is disputed. Malloney vs. Horen, 49 New York 11; Seekels vs. Norman, 71 Iowa 265-267.

To constitute an estoppel in pais, there must be a false representation, or concealment of known material facts, made to a party ignorant of their truth or falsity, and made with the intent that the latter party should act upon them, and he must have so acted.

Blodgett vs. Penn. 97 *Mo.* 263.

Barry vs. Wheeler, 128 *Mo.* 84.

To constitute an estoppel in pais, the party claiming the benefit of it must show that he acted in reliance on the acts of the one sought to be estopped, and without other knowledge of the facts, or means of acquiring such knowledge.

Smith vs. Trammel, 68 *Iowa* 488-490.
Ficher vs. Johnson, 106 *Iowa*, 181-187.

"No principle is better settled than that a party is not estopped by his silence, unless it has misled another to his hurt.

Held vs. Epperly, 31 *Pennsylvania*, 334.
Philadelphia Wilmington & Baltimore R. vs. DuBois, 79 *United States* 47, 12 *Wall.* 47.

It is essential to the application of the doctrine of estoppel that the party claiming to have been influenced by the conduct or declarations of another, was himself not only destitute of knowledge of the true state of the title, but also with no convenient and available means of acquiring such knowledge. Where the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there is no estoppel.

"An estoppel in equity may arise if one person is induced to act prejudicially to himself in consequence of the acts or declarations of another, on which he had a right to rely."

Branson vs. Wirth 17 *Wall* 33.

VIII.

THE ADJUDICATIONS IN WHICH ONE IS HELD ESTOPPED FROM DENYING THE JURISDICTION OF THE FEDERAL COURT ARE THOSE IN WHICH THE PARTY WHO DENIES THE JURISDICTION INVOKED THE ACTION OF THE FEDERAL COURT, AND RELATE TO CASES IN WHICH THE DEFECTS ARE NOT TRULY JURISDICTIONAL, AS DEFINED IN SECTION 2, OF THE ACT OF 1887-88.

Fourth Question:—

In the case Baggs vs. Martin, 179 U. S., 205, it was held that removal into the Federal Court by a receiver appointed by it, of an action pending against him in the State Court, constitutes a waiver of any right he may have had to

have the matter decided by the state tribunal, but was not an attempt to confer jurisdiction by consent, since the Federal Court has jurisdiction either exclusive or concurrent of an action against a receiver it has appointed, and therefore such removal estops him from thereafter contesting the right of the Federal Court to determine the case.

The receiver who afterwards contested the jurisdiction of the court, brought the case to the Federal Court on his application of removal. We quote the following from the opinion.

"We do not mean to be understood to say that mere consent or even voluntary action by the parties can confer jurisdiction upon a court which would not have possessed it without such consent or action.'

'Again:

"But here the Circuit Court had independently of the citizenship of the parties in the damage suit, jurisdiction over the Railroad and its property in the hands of its receiver.....but when the receiver waiving any right he might have had to have his cause tried in the State Court, brought it before the Court whose officer he was, he cannot successfully dispute its jurisdiction. The claim was against him as a receiver, and if successfully asserted would affect the property of the Denver City Railroad Company, which was in course of administration by the Circuit Court of the United States for the benefit of its creditors, among whom were the defendants in error. First, then, the cause of action arose out of the alleged misconduct of the receiver, or his agents, for whom he was responsible, and as the property to be affected was in the exclusive control of the Circuit Court that court plainly had jurisdiction to entertain and determine the controversy, whether that jurisdiction was invoked by the parties seeking redress or as in this case, by the receiver."

In the case of Giles vs. Harris, 189 United States, 475, a question arose whether it was necessary to make an allegation, where a party asked redress for political rights, that the value of such right and privilege exceeds the sum of Two

thousand dollars. The majority of the Court speaking through Mr. Justice Holmes, said:

"But assuming that the allegation should have been made in a case like this, the objection to its omission was not raised in the Circuit Court, and as it could have been remedied by amendment, we think it unavailing. The certificate was made *alio in tuitu*. There is no pecuniary limit on appeals to this Court under Section 5 of the Act of 1891, Ch. 517, 26 St. A. 828, United States (Comp. Stat. 190 1 P. 549) The Paquette vs. Havana, 175 United States 677-683; and we do not feel called upon to send the case back to the Circuit Court in order that it may permit the amendment. In Rose vs. Green, 159, United States, 651, no notice was taken of the absence of an allegation of value in a case like this."

In the case at bar no amendment could cure the defect; it was not a failure to make an allegation, but the cause was removed on the petition of a party forbidden by law to secure such removal. The description of the party who made the removal did not bring the case within the class.

The minority oponion of Mr. Justice Harlan in Giles vs. Harris collects the authorities of this court showing that as the Circuit Court was a court of limited jurisdiction there is a presumption that it has not jurisdiction in a particular case, unless such jurisdiction is affirmatively disclosed. The presumption is that a cause is without the jurisdiction of the Federal Court unless the contrary appears. Turner vs. Bank of North America, 4 Dallas, 8. Brown vs. Keen 8 Peters, 115. Ex parte Smith 94 United States 455. Robertson vs. C. C. A. S. E., 97 United States 646; Mansfield C. L. & M. R. Co. vs. Swan, 111 United States 378-382 Mattingly vs. N. W. Va. R. Co. 158 United States 57; Parker vs. Ormsby 141 United States 83; Chapman vs. Barney, 129, United States 677-681; Metcalf vs. Watertown, 188, United States 587; Cambridge Co. vs. Otoe City 129, United States 226; Harris vs. Watson 113 U. S. 505-598.

In the case of Fichet vs. Shropsshire, 147 United States

133 in an opinion written by Chief Justice Fuller, it was held:

"The Circuit Court should not be deprived of jurisdiction at the suggestion of the party who voluntarily invoked it."

The jurisdiction discussed in this case relates to the powers of the Federal Court of equity in dealing with necessary or proper parties to an action, and did not involve the construction of the truly jurisdictional question involved in Section Two of the Act of 1887-88.

That this is true, is shown by following quotation:

"If George Lyle who was fully aware of the pendency of the suit and gave his testimony therein, desired to set up equities which he claimed arose from the payment of part of the purchase of the property before the suit was brought, he might as pointed out by the Circuit Court, have intervened in the cause, for the protection of his rights, without ousting the jurisdiction. This he did not do, and we are not prepared to hold the Circuit Court to be deprived of jurisdiction at the suggestion of the party who voluntarily invoked it. Undoubtedly George Lyle would have been a proper party to the proceeding, but we do not regard the case as one in which his interest in the subject matter and in the relief sought, was so bound up with John Lyle that his legal presense as a party was an absolute necessity without which the Court could not proceed."

In Cowley vs. Northern Pacific Railroad Company, 150 United States, 560, this statement is found in the opinion of the Court written by Mr. Justice Brown:

"The case having been removed to the Circuit Court upon the petition of defendant, it does not lie in its mouth to claim that such Court had not such jurisdiction of the case, unless the Court from which it was removed, had no jurisdiction."

The jurisdiction here discussed is whether Federal Courts may in equity deal with new rights and privileges created by the statutes of the State of Washington, which establishes a special proceeding in its courts therefor. We say that this question is not a truly jurisdictional question

such as involved under Section Two of the Removal Act.

The Circuit Court held that the remedy was at law; and not in equity; that was a decision that the Circuit Court had no jurisdiction as a court of the United States. Blythe vs. Hinckley, 173 United States, 501-506.

To the same effect is Huntington vs. Laidley, 176 United States, 668.

All of which is respectfully Submitted,

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